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U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED

UNITED STATES DISTRICT COURT

MAR 06 1996

WESTERN DISTRICT OF LOUISIANA

ROBERT M. SHEMWELL, CLERK

SHREVEPORT DIVISION

BY
DEPUTY

CRYSTAL OIL COMPANY AND
CRYSTAL EXPLORATION AND
PRODUCTION COMPANY,
Plaintiffs,

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CASE NO. CV95-2115S

vs.

JUDGE STAGG

ATLANTIC RICHFIELD COMPANY,
Defendant.

MAGISTRATE JUDGE PAYNE

MOTION TO TRANSFER CASE TO
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

NOW INTO COURT, through undersigned counsel, comes defendant, ATLANTIC RICHFIELD COMPANY ("ARCO" or "defendant"), and, pursuant to 28 U.S.C. § 1404(a), respectfully moves the Court to transfer this case to the United States District Court for the District of Colorado, for the following reasons:

1.

28 U.S.C. § 1404(a) provides that for "the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

(11) M

2.

The United States District Court for the District of Colorado is significantly more convenient and better achieves the interests of justice in this case.

3.

The particular grounds for this Motion are contained in the Memorandum which is filed in support of the Motion.

4.

Defendant requests that the Court set a hearing on this Motion.

WHEREFORE, DEFENDANT, ATLANTIC RICHFIELD COMPANY, PRAYS that the Court set this matter for hearing and that an Order be issued pursuant to 28 U.S.C. § 1404(a) transferring this case to the United States District Court for the District of Colorado.

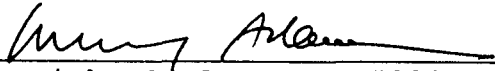
DEFENDANT FURTHER PRAYS for all orders and decrees necessary in the premises and for full, general and equitable relief.

Shreveport, Louisiana, this 6^C day of March, 1996.

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SHREVEPORT DIVISION

CRYSTAL OIL COMPANY AND
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PRODUCTION COMPANY,
Plaintiffs,

vs.

ATLANTIC RICHFIELD COMPANY,
Defendant.

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MAGISTRATE JUDGE PAYNE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Transfer Case to the United States District Court for the District of Colorado and Memorandum in support thereof has been served upon plaintiffs' counsel of record, Osborne J. Dykes, III, Fulbright & Jaworski, 1301 McKinney, Suite 5100, Houston, Texas 77010-3095, and Albert M. Hand, Jr., Cook, Yancey, King & Galloway, P. O. Box 22260, Shreveport, Louisiana 71120-2260, by depositing a copy of same in the U.S. Mail, properly addressed, with adequate postage affixed thereto.

Shreveport, Louisiana, this 6th day of March, 1996.


OF COUNSEL

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED

MAR 06 1996

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
BY Robert H. Shemwell CLERK
DEPUTY

SHREVEPORT DIVISION

CRYSTAL OIL COMPANY AND
CRYSTAL EXPLORATION AND
PRODUCTION COMPANY,
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vs.

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CASE NO. CV95-2115S

JUDGE STAGG

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MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO TRANSFER CASE TO THE
UNITED STATES DISTRICT COURT
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CRYSTAL OIL COMPANY,
AND CRYSTAL EXPLORATION AND
PRODUCTION COMPANY,

v.

Defendant

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Magistrate Judge Payne

Defendant Atlantic Richfield Company ("ARCO")
respectfully submits this Memorandum in Support of Defendant's
Motion to Transfer Case to the United States District Court for the
District of Colorado.

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INTRODUCTION

A. Site Background. This dispute arises out of ARCO's attempt to obtain reimbursement from Crystal Oil Company ("Crystal Oil") and Crystal Exploration and Production Company ("Crystal Exploration") for cleanup activities at a historic mining site in a remote region of southwestern Colorado, in and around the small town of Rico, Colorado (the "Rico Site"). From the early 1900s through the 1970s, the Rico Argentine Mining Company ("RAMC") produced silver, lead, zinc and other metal ores at the Rico Site, resulting in the disposal of mine tailings and other mine wastes in the area. Complaint of Crystal Oil and Crystal Exploration ("Complaint"), ¶ 7. A wholly-owned subsidiary of Crystal Oil purchased RAMC and its Rico Site assets in 1974, and continued to operate in the area. Complaint, ¶ 8; Report from Colorado Division of Mines (identifying operations at site by RAMC in the mid-1970s), Defendant ARCO's Factual Appendix in Support of Brief ("Appendix"), Tab 1. In 1977, Crystal Oil merged this wholly-owned subsidiary into Crystal Exploration (another wholly-owned subsidiary of Crystal Oil). Complaint, ¶ 8.

In 1980, The Anaconda Company ("Anaconda"), a predecessor of ARCO, purchased the real and personal property at the Rico Site from Crystal Exploration pursuant to a Purchase Agreement dated June 17, 1980 between Anaconda and Crystal Exploration (the "Purchase Agreement"), as supplemented by a Closing Agreement dated August 27, 1980 (the "Closing Agreement") (collectively referred to

as the "Rico Purchase Agreement"). Appendix, Tab 2. The Rico Purchase Agreement explicitly subjects all disputes arising out of this transaction to Colorado law. Appendix, Tab 2. (Purchase Agreement, § 12(b)).

Anaconda conducted limited exploratory work during its term of ownership, and in 1988, sold all its interest in the property to a group of local developers. Appendix, Tab 3. Working with ARCO and local interests, these site owners are currently formulating development plans to take advantage of the area's diverse natural attractions. Appendix, Tab 4.

As with many old mining towns in Colorado, however, the legacy of past mineral production at Rico has gradually spurred environmental concerns. In 1976, a state water quality discharge permit ("Water Quality Permit") was issued to RAMC under Colorado law to address certain historic mine drainages. Appendix, Tab 5. This Water Quality Permit was transferred to Anaconda as part of the 1980 Rico Purchase Agreement; the Closing Agreement deals extensively with this transfer, giving rise to the contract language relied upon by Plaintiffs in their Complaint. A local landowner now holds the Water Quality Permit.

In the early 1990s, the Environmental Protection Agency ("EPA") also began investigating the Rico Site to assess the level of contamination and the extent of any threat to human health and the environment. Appendix, Tab 6. These ongoing actions are a

precursor to possible listing of the Site on the National Priority List ("NPL") established under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA" or "Superfund").

Faced with the delays, economic costs, and the stigma associated with Superfund designation, ARCO began teaming with local interests in 1994 to initiate cleanup of key selected areas within the Rico Site pursuant to the Colorado Voluntary Cleanup and Redevelopment Act ("VCRA"), Colo. Rev. Stat. § 25-16-301 et seq. VCRA, enacted by Colorado in 1994, creates a novel environmental scheme designed to encourage a streamlined, practical approach to cleaning up and redeveloping contaminated sites without NPL listing. Id. Cleanup plans are submitted by the local landowners to the Colorado Department of Public Health and Environment ("CDPHE"), which oversees the VCRA process, often with input from regional personnel from the Denver office of the Environmental Protection Agency ("EPA"). Id.

ARCO and local Rico entities have now submitted several applications under the VCRA program for particular sites in the Rico area, triggering one of the first voluntary state cleanups at a historic mining site. Appendix, Tab 7. Generally, historic mine cleanup is the major environmental issue in Colorado, and a vast body of case law under CERCLA and other environmental laws pertinent to mining sites has issued from the Colorado federal district court and the Tenth Circuit. Unfortunately, these

decisions have come only after many years of expensive litigation over CERCLA issues, delaying any cleanup work. See e.g. State of Colorado v. Idarado Mining Co., 707 F. Supp. 1227 (D. Colo. 1989), amended, 735 F. Supp. 368 (D. Colo. 1990), rev'd and remanded, 916 F.2d 1486 (10th Cir. 1990), cert. denied 499 U.S. 960 (1990) (protracted CERCLA case at a Colorado historic mine site, involving a series of trials and generating a record on appeal of sixty volumes). In turn, the application of VCRA at the Rico Site could become a model for more streamlined cleanups at historic mining sites.

B. The Instant Dispute. As ARCO began building a consensus to submit the voluntary cleanup plans for the Rico Site, it also began to identify historic activities at the Site which led to the generation of the mine wastes at issue. It became critical to enlist the support of other historically involved parties to finance the voluntary plans, since ARCO's mere exploratory activities at the Rico Site -- as opposed to actual mining -- limits its exposure to cleanup liabilities. RAMC, and its successors Crystal Oil and Crystal Exploration, were easily identified as the key historical players in the mining district and the parties to whom significant cleanup costs should be allocated. See Complaint, ¶ 7 (RAMC was the "primary owner and operator" at site). Through various telephone contacts and correspondence, ARCO contacted Crystal Oil in the spring of 1995 and asked that it join ARCO and local entities in financing the development and implementation of the voluntary plans. Appendix, Tab 8. ARCO also

contacted various other companies with a historic role in the mining district, such as NL Industries, Inc., to seek their participation. Appendix, Tab 9.

After deferring any substantive response for nearly six months, Crystal Oil representatives responded with a predictable, yet logical, request: They asked to physically review the site in order to understand the thrust of the cleanup and to obtain the necessary local perspective for considering ARCO's request. This site visit was conducted in October 1995, which culminated with a promise from Crystal representatives to promptly respond to ARCO on the content of the voluntary cleanup plans and the willingness of Crystal Oil to participate in the process. Appendix, Tab 10.

The instant litigation ensued, without any further communication from Crystal Oil representatives. Plaintiffs seek a declaratory judgment that they cannot be held liable to ARCO for Rico Site cleanup costs on two grounds: First, that Anaconda allegedly assumed the liabilities of Crystal Exploration as part of the 1980 Rico Purchase Agreement; and Second, that Crystal Oil discharged its liability for this matter through bankruptcy proceedings initiated in 1986.

As discussed below, these two claims alone raise significant Colorado-based factual and legal questions which strongly warrant the transfer of this matter to the Colorado Federal District Court. Moreover, as Plaintiffs expressly

acknowledge, this action is essentially a CERCLA case; see Complaint, ¶¶ 1, 3, 20 and 21. Plaintiffs' narrow claims against ARCO therefore represent only the "tip of the iceberg" in this matter. At issue is not simply allocation of liabilities between ARCO and the Crystal entities, but a range of issues involving other prior operators, the State of Colorado, the Colorado offices of EPA and the U.S. Forest Service, a host of local Rico landowners, developers and municipal officials, and numerous other Colorado-based entities.

As this CERCLA litigation proceeds, it will doubtlessly escalate in a number of fashions to involve many of these parties. First, ARCO has now counterclaimed against the Crystal entities seeking all Rico Site costs previously incurred and to be incurred under CERCLA.¹ Second, ARCO will soon be forced to bring into this dispute other potentially responsible parties over whom the court has jurisdiction, such as NL Industries and the U.S. Forest Service (which owns land on the site). These parties will doubtlessly seek recovery of their own costs against the Crystal entities and ARCO, raising a myriad of difficult claims. Third, to the extent jurisdiction is not available in this Court over local Rico landowners and other potentially liable CERCLA parties in Colorado, ARCO will be forced to initiate another lawsuit in Colorado against

¹ Regardless of whether the Rico Site is ultimately designated as an official "Superfund" site and listed on the NPL, ARCO will be entitled to seek its costs under CERCLA's established right to private cost recovery. See 42 U.S.C. § 9607(a).

these parties; the Crystal entities may be joined in this concurrent action as well.

Ironically then, Crystal's "preemptive strike" suit will only set in motion the exact type of protracted and costly litigation that the voluntary cleanup proposal was designed to avoid. Crystal is entitled to make that choice. ARCO's point is that this dispute over Rico Site costs is inextricably linked to Colorado witnesses, parties, law, facts and policy. It would be wasteful, duplicative and downright unjust for litigation pertaining to this matter to be heard anywhere else.

SUMMARY OF ARGUMENT

Colorado provides a significantly more convenient venue than Louisiana, and transfer of this action to Colorado, pursuant to 28 U.S.C. § 1404(a)², would promote the interests of justice. Plaintiffs' declaratory judgment claims alone require substantial access to witnesses, documentation, and physical evidence located in Colorado and raise significant Colorado legal and policy questions. Furthermore, these claims form only the kernel of a larger dispute concerning the allocation of CERCLA cleanup costs at the Rico Site. Resolution of these broader cleanup matters is even

² Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

more dependent on Colorado-based parties, witnesses, evidence, law and policy.

In turn, a comprehensive review of the traditional § 1404(a) criteria strongly supports transfer of venue to the federal District Court of Colorado. ARCO and Crystal Exploration freely and mutually chose the application of Colorado law to all disputes arising from the Rico Purchase Agreement, which was largely drafted and executed in Colorado. Interpreting the key contract provisions will require access to significant Colorado-based factual evidence and witnesses, particularly regarding the Water Quality Permit. Construing the contract also requires the Court to weigh important state policy issues surrounding the contractual assumption of unknown, contingent liabilities -- policy which is best discerned by a local court. Thus, application to Colorado courts to interpret this contract best effectuates the parties' intentions and promotes the interests of justice.

Crystal Oil's second claim -- that it completely discharged its cleanup obligations through bankruptcy -- also requires a highly fact-dependent, Colorado-based analysis. This analysis turns on whether ARCO fairly contemplated that a CERCLA claim existed against Crystal Oil in 1986. Such an analysis requires extensive testimony and analysis from Colorado sources and raises important state policy issues for mining sites.

Beyond these immediate claims, Plaintiffs have by their own admission triggered a CERCLA cost recovery case, renowned for its protracted, multi-party, multi-track nature. Such a case will be particularly cumbersome and burdensome to the parties if allowed to proceed in Louisiana, in part because several key third party defendants (Colorado residents) are not subject to jurisdiction in Louisiana, necessitating the initiation of a parallel CERCLA cost recovery action in Colorado, as well as the fact that the key witnesses and documentation reside in Colorado.

Finally, Plaintiffs' attempt at a "preemptive strike" at the very early stages of settlement discussions involving a collective voluntary cleanup effort operates against the interests of justice and should be discouraged by the court, particularly where plaintiffs' choice of forum will only increase litigation costs and divert more resources from cleanup efforts.

ARGUMENT

I. THE BASIC FACTORS GOVERNING A VENUE TRANSFER DETERMINATION STRONGLY FAVOR TRANSFER TO THE DISTRICT COURT OF COLORADO

Although a plaintiff's choice of forum should be given its appropriate weight in making a transfer determination pursuant to 28 U.S.C. § 1404(a) (See Schexnider v. McDermott Intern., Inc., 817 F.2d 1159, 1162-63 (5th Cir.), cert. denied 484 U.S. 977

(1987); Merle Norman Cosmetics v. Martin, 705 F. Supp. 296, 301-302 (E.D. La. 1988)), that choice is not controlling, and must be disregarded where, as under the facts of this case, transfer is otherwise appropriate. See Jarvis Christian College v. Exxon Corp., 845 F.2d 523 (5th Cir. 1988); Central Hudson Gas & Elec. v. Empressa Naviera Santa S.A., 769 F. Supp. 208, 209 (E.D. La. 1991); Merle Norman Cosmetics, 705 F. Supp. at 303; see also Kempe v. Ocean Drilling & Exploration Co., 683 F. Supp. 1064 (E.D. La. 1988), aff'd 876 F.2d 1138, cert. denied 493 U.S. 918 (1989) (providing a lengthy examination of common § 1404(a) criteria in the analogous forum non conveniens context and deciding to dismiss based on weight of factors favoring trial in Bermuda).

A district court, acting pursuant to 28 U.S.C. § 1404(a), may transfer any civil action to any other district or division where it might have been brought.³ Traditionally, courts consider a variety of factors to determine whether to transfer venue pursuant to § 1404(a), including: (1) convenience of the witnesses; (2) convenience of the parties; (3) interests of justice under all of the circumstances; (4) the desirability of having the case tried by the forum familiar with the applicable substantive law; (5) the locus of operative facts and ease of access to sources of proof; (6) practical difficulties; (7) relative means of the parties; (8) the availability of process to compel the attendance of witnesses;

³ Plaintiffs could have brought this action in Colorado since ARCO has an office in Denver and conducts business throughout Colorado, the Site is located in Colorado, and part of Plaintiffs' Complaint concerns a contract executed in Colorado.

and (9) calendar congestion. See Michael Slaughter v. Southeastern Medical Supply, C.A. No. 95-1519 (W.D. La. Nov. 6, 1995) (mem.) (citing to National Utility Service, Inc. v. Queens Group, Inc., 857 F. Supp. 237, 240 (E.D.N.Y. 1994)); Clark v. Moran Towing & Transp. Co., Inc., 738 F. Supp. 1023, 1031 (E.D. La. 1990); see also Schexnider v. McDermott Intern., Inc., 817 F.2d 1159, 1162-63 (5th Cir.), cert. denied 484 U.S. 977 (1987). These factors weigh heavily in favor of transfer of this case to the District Court of Colorado.

II. PLAINTIFFS' CONTRACT CLAIMS ARE GROUNDED IN COLORADO
LAW AND RAISE SIGNIFICANT COLORADO-BASED FACT ISSUES

A. Plaintiffs' Contract Claim Is Tied Directly to
Fact Issues Surrounding a Colorado Permit

The division of environmental liabilities which Plaintiffs allege was created under the Rico Purchase Agreement was integrally related to the terms of the State Water Quality Permit issued to RAMC. See Complaint, ¶ 18. The subject Closing Agreement is largely devoted to the status of and potential enforcement activities surrounding this Permit and its impact on the pending transfer of the property. Although Plaintiffs allege that Section 3 of the Closing Agreement limits all of their environmental liability (See Complaint ¶ 18), this section when read in context allocates liability only for certain Water Quality

Permit infractions.⁴ As opposed to covering CERCLA liability, the contract provisions quoted in Plaintiffs' Complaint solely cover the Permit proceedings, addressing as an aside other miscellaneous closing matters.

The interpretation, issuance and enforcement of this Water Quality Permit has a long and complex history involving a number of different water discharge points, permittees and agency officials. See Appendix, Tab 5. To begin to examine the parties' intent surrounding these cited contractual provisions at the time of drafting, and to determine how and whether such provisions even apply to a then nonexistent CERCLA claim, requires an extensive review of permit history and an examination of witnesses and parties involved with permitting at the Site. These witnesses and documentary evidence uniformly reside in Colorado. The nuances of these water quality and water law matters is an area unique to Colorado, particularly when applied at mining sites with a patchwork history of private and public mining claims and landowners. See U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th

⁴ Section 3 of the Closing Agreement provides: "It is understood by the parties that the Colorado Water Quality Control division (CWQCD) may be contemplating the imposition of compliance requirements on and/or the commencement of enforcement actions against the owner-operator of certain mining facilities . . . as a result of certain NPDES permit violations alleged to have occurred at these facilities. The present owner-operator of these facilities is the Rico Argentine mining Company. In recognition of the fact that the NPDES permit covering these facilities (i.e. No. CO-0029793) will be transferred to Anaconda on or shortly after August 27, 1980, the parties hereto have agreed, with respect to all possible liabilities associated [with] the alleged permit violations, as follows:" Appendix, Tab 2 (Closing Agreement § 3).

Cir. 1979); see, also Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 1434-35 (D. Colo. 1993) (addressing the interaction between state law and federal water quality requirements).

The other language in the Closing Agreement purportedly assigning ARCO responsibility for this matter, see Complaint, ¶ 19, is far from clear -- it contains neither an indemnity nor an actual assumption by ARCO of future liabilities between the parties. To construe this provision, this Court must resolve sensitive issues of whether contingent and unknown civil (and even criminal) environmental liabilities under a subsequent law such as CERCLA can be deemed to be transferred or released based on such general language. This issue has spawned extensive caselaw and much controversy nationwide, leaving courts to draw upon state contract law to reach state-by-state determinations. See, e.g., John S. Boyd Co., Inc. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993) (using state law, the intent to transfer CERCLA liability must be explicit or clearly intended in the contractual provision to be valid); Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10, 14 (2d Cir. 1993) (finding that federal courts should incorporate state law when interpreting contractual agreements allocating CERCLA liability).

Precedent on this substantive state law issue is best developed by a Colorado court familiar with the State's particular contract interpretation rules. In Colorado, for example, a liability transfer provision is never extended beyond its plain

meaning (Omnibank Parker Road v. Employers Insurance of Wausau, 961 F.2d 1521 (10th Cir. 1992) (applying Colorado law)), while the scope of general release language relies on the intent of the negotiating parties. Neves v. Potter, 769 P.2d 1047, 1053 (Colo. 1989). In short, Plaintiffs' contract claim requires an extensive review of Colorado contract, water and permitting laws with which Colorado courts are much more closely familiar, and which requires access to numerous witnesses and documentation available in Colorado, not Louisiana.

**B. The Parties' Decision to Apply Colorado Law to
Contract Disputes is an Important Factor
Supporting Transfer of Venue**

Given these and related considerations, it is no coincidence that Anaconda and Crystal Exploration explicitly chose to apply the laws of Colorado to all disputes when they executed the Rico Purchase Agreement:

"[t]his agreement and all other instruments executed in furtherance of the transaction contemplated hereby, and the rights and obligations of the parties hereunder and under such other instruments, shall be governed in accordance with the laws of the State of Colorado." Purchase Agreement, § 12(b), p.7.

Such a mutually agreed-upon choice of law provision should be accorded deference in a § 1404(a) transfer determination. Viacom International, Inc. v. Melvin Simon Productions, Inc., 774 F. Supp. 858, 868 (S.D.N.Y. 1991) (although not solely dispositive,

"a case normally should be tried in a forum at home with the governing law."); C. Kreisner v. Hilton Hotel Corp., 468 F. Supp. 176, 179 (E.D.N.Y. 1979) (even in the absence of novel issues, the construction of state law should be decided by the courts most familiar with it); Vaughn v. American Basketball Association, 419 F. Supp. 1274, 1278 (S.D.N.Y. 1976) (when a contract is made in and subject to the laws of a particular state, it is desirable to have a judge from that state interpret the contract); see also Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988) (a contractually bargained-for provision is an important factor in a § 1404(a) analysis); Kempe v. Ocean Drilling & Exploration Co., 683 F. Supp. 1064, 1072-73 (E.D. La. 1988), aff'd 876 F.2d 1138, cert. denied 493 U.S. 918 (1989) (applicable law an important factor in the analogous forum non conveniens analysis).

A choice of law provision carries particular weight in a § 1404(a) transfer decision when a case involves novel issues of state law. Merle Norman Cosmetics v. Martin, 705 F. Supp. 296, 303 (E.D. La. 1988) (the presence of complex or unique issues of state law may demand a transfer of venue). Not only does this matter involve the application of Colorado's new voluntary cleanup law, it raises important State issues regarding the extent and scope of contractual assignments of unknown, contingent environmental liabilities. The parties' choice of Colorado law on this point is best effectuated by a transfer of venue to Colorado.

In a related vein, the Rico Purchase Agreement was largely drafted and executed in Colorado.⁵ ARCO personnel involved in negotiating, drafting and executing the Rico Purchase Agreement still reside in Colorado; testimony may also be required from Crystal Exploration's Denver counsel who played a key role in the transaction⁶ (including significant drafting of the Closing Agreement). Additionally, many of the relevant transactional documents impacting Plaintiffs' claims are located in the Denver, Colorado offices of ARCO.

III. PLAINTIFFS' BANKRUPTCY CLAIMS TURN ON FACTUAL AND PUBLIC POLICY ISSUES BEST EXAMINED IN COLORADO

The need for Colorado-based documents and testimony also permeates plaintiffs' bankruptcy claim. Many courts have found that a reorganized corporation such as Crystal Oil remains liable for CERCLA liabilities if the potential claimant did not fairly contemplate the CERCLA problem at the time of the entry of the bankruptcy confirmation order. See In re Penn Central Transportation Co., 944 F.2d 164,168 (3d Cir. 1991); In re CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992); In re Tutu Wells

⁵ The Closing Agreement states: "IN WITNESS WHEREOF, the parties have executed this Closing Agreement at Denver, Colorado on this 27th day of August, 1980." Closing Agreement, p. 12, Appendix, Tab 2.

⁶ One of the key Crystal Exploration attorneys responsible for negotiating and drafting the Closing Agreement, Davis O'Connor, continues to practice at the Denver law firm of Holland & Hart. The other Holland & Hart attorney who participated in this deal, Kenneth D. Hubbard, continues to practice in Denver. See Appendix, Tab 11.

Contamination Litigation, 846 F. Supp. 1243, 1279 (D. V.I. 1993); In re National Gypsum Co., 139 B.R. 397 (N.D. Tex. 1992). This determination requires an intensive, fact-based analysis to ascertain ARCO's knowledge at the time of the 1986 bankruptcy proceeding.

Such an examination mandates extensive testimony from Colorado witnesses, including ARCO employees and managers, state agency officials, and regional EPA personnel. For instance, significant testimony and document production from Denver EPA and CDPHE officials would be required about the status of site investigations in 1986 and the status of water quality permitting proceedings spearheaded by CDPHE. Exploring these factors would also require extensive testimony from Rico Site managers, ARCO Denver based management and the numerous local landowners potentially impacted by such a designation. The convenience of such witnesses is the preeminent factor in making a transfer decision. See, e.g., Crawford & Co. v. Temple Drilling Co., 655 F. Supp. 279, 281 (M.D. La. 1987).

The fact that the original bankruptcy proceedings took place in Louisiana carries little weight here. No factual dispute exists regarding Crystal Oil's basic bankruptcy proceedings in 1986 or ARCO's limited role therein. Close access to the bankruptcy files will not assist the Court in resolving this matter, since it is undisputed that no specific claim for CERCLA cleanup costs at Rico was presented by any entity at that time. Instead, the

outstanding bankruptcy issue raised by Plaintiffs' claim -- whether an entity such as ARCO obtained knowledge of potential CERCLA claims in 1986 simply by being involved in an historic mining district containing typical mine remnants -- again requires close scrutiny of facts, documents, witnesses and public policy considerations ingrained in Colorado.

IV. THE UNDERLYING DISPUTE CONCERNS A COLORADO-BASED CERCLA COST RECOVERY ACTION AND TRANSFER TO THE DISTRICT OF COLORADO SUBSTANTIALLY IMPROVES ACCESS TO PARTIES, WITNESSES AND SOURCES OF PROOF FOR SUCH CLAIMS

As discussed above, ARCO has already begun to clean up the Rico Site pursuant to authority in Colorado's voluntary cleanup program, although the extent of this cleanup turns on Crystal Oil's future participation. Pursuant to CERCLA Section 107(a), 42 U.S.C. § 9607(a), ARCO (and any other party incurring response costs) may recover these costs from other parties by establishing that: (1) there has been a release or a threatened release of a hazardous substance from a facility, (2) the release or threatened release caused the incurrence of necessary response costs, (3) the response costs were consistent with the national contingency plan ("NCP"), and (4) the defendant is one of four statutory categories of responsible parties. See FMC Corp. v. Aero Industries, Inc., 998 F.2d 842, 845 (10th Cir. 1993); KN Energy, Inc. v. Rockwell Int'l Corp., 840 F. Supp. 95, 97 (D. Colo. 1993). ARCO has brought a

counterclaim against Plaintiffs on just these grounds, and more such claims are bound to follow.

This CERCLA cost recovery component of this action should also proceed in Colorado for four primary reasons. First, many of the potentially responsible parties (e.g., local landowners) are Colorado residents incapable of being brought into court outside of Colorado. Many courts emphasize that a key criterion for whether transfer is "in the interests of justice" is whether the transfer will avoid duplicative litigation and drain judicial resources. See Merle Norman Cosmetics v. Martin, 705 F. Supp. 296, 298 (E.D. La. 1988).

Second, the State of Colorado has a significant interest in CERCLA issues at this site, since one of the key elements of proof here is that costs incurred pursuant to the Colorado voluntary cleanup program are "consistent with the NCP." Absent such a holding, parties performing voluntary cleanups will not be well positioned to recover costs expended under VCRA, severely limiting the role of the voluntary cleanup program in Colorado. Such a delicate state issue should be resolved by a Colorado court, creating important precedent for future cleanups.

Third, witnesses on the broader CERCLA issues at stake here also predominately reside in Colorado, as do the vast majority of potential third party defendants. See Crawford & Co. v. Temple Drilling Co., 655 F. Supp. 279, 281 (M.D. La. 1987); Southern

Investors II v. Commuter Aircraft Corp., 520 F. Supp. 212, 218

(M.D. La. 1981). (One of the primary criteria to assess in making a transfer determination is the convenience of witnesses, particularly key witnesses.) At a minimum, the following witnesses would be involved: (1) former managers and employees at the Rico site to testify about "releases" from the sites and the evolution of cleanup efforts, most of whom reside in Colorado; (2) CDPHE officials and EPA officials responsible for assessing and regulating the site, all of whom reside in Colorado; (3) Colorado-based representatives of the U.S. Forest Service, which is a current landowner at the Rico Site; (4) personnel involved in current cleanup efforts and assessment of historic environmental damage, all of whom reside in Colorado; and (5) current, individual landowners in the Rico Site area, who may well become third party defendants, as well as local developers and Rico town officials who may testify, many of whom reside in or near Rico, Colorado and are generally of limited economic means.

Compelling all of these Colorado witnesses to travel to Louisiana for an indeterminate amount of time for trial would impose a substantial and unnecessary burden and financial hardship. This heavy economic burden would also impact public funds since numerous state and federal agency officials will testify on a variety of topics.

Fourth, ARCO, the CDPHE, EPA and Forest Service also possess substantial files in Colorado necessary to fully resolve

this dispute. The combination of location of evidence and significant state interest provides a clear and substantial nexus with Colorado and Colorado law. The combined weight of these factors substantially favors the trying of these issues in Colorado. See Central Hudson Gas and Electric Corp. v. Empressa Naviera Santa S.A., 769 F. Supp 208, 209 (E.D. La. 1991) (the location of sources of proof plays a key role in the analysis, and combined with other factors (particularly the location of witnesses), makes transfer appropriate); United Companies Life Insurance Co. v. Butler-Phillips Management Services, Inc., 741 F. Supp. 1244, 1246 (M.D. La. 1990) (it is appropriate to transfer venue to a more convenient forum which has greater ease of access to documentation, other sources of proof and witnesses).

**V. TRANSFER TO THE DISTRICT OF COLORADO BETTER SERVES
THE INTERESTS OF JUSTICE**

The interests of justice are best served when the trial proceeds efficiently and economically in the forum with the greatest nexus between the parties, the witnesses, the applicable law and the presence of and ability to easily present the substantive facts. This is particularly true here, where the case at hand is inherently linked to a unique blend of Colorado issues with which Colorado federal judges have vast experience. In this regard, many Colorado justices find it useful (and even crucial) to visit the site at hand to fully understand the diverse factors at issue at historic mining sites. See Appendix, Tab 12 (evidencing

site visit by Judge Carrigan and other parties to mining site). Judge Carrigan's first opinion in the Idarado case amply evidences this site visit and the detailed attention to the history of the site, mineralogy, topography, geology, hydrology and other unique site knowledge required to decide these cases. See State of Colorado v. Idarado Mining Company, 707 F. Supp. 1227 (D. Colo. 1989). Ironically, plaintiffs' counsel had the same exact concern -- prior to deciding to file suit in Louisiana -- leading to the October, 1995 Rico Site visit.

In fact, the timing of plaintiff's "preemptive strike" in Louisiana actually supports venue transfer. Courts are particularly reluctant to simply acquiesce to plaintiff's choice of venue where the first suit is a preemptive strike in the form of a declaratory judgment filed in anticipation of a broader action. See Michael Slaughter v. Southeastern Medical Supply, C.A. No. 95-1519, 8-10 (W.D. La. Nov. 6, 1995) (mem.) ("If the first-filed rule were mechanically applied in all cases, parties would be discouraged from attempting settlement negotiations."); Merle Norman Cosmetics v. Martin, 705 F. Supp. 296, 298-299 (E.D. La. 1988) (finding that a complaint filed in anticipation of a subsequent suit may void the preference for plaintiff's choice of forum). ARCO has not yet filed a third-party CERCLA cost recovery action in Colorado, in hopes of continuing what had been very formative settlement negotiations with all appropriate parties in order to achieve the goals of the voluntary cleanup. If this case is not transferred, however, ARCO will be required to file a

parallel, duplicative suit in Colorado to obtain jurisdiction over numerous third party defendants and to fully prosecute the CERCLA cost recovery portion of this case, thereby wasting time, money and judicial resources. Under these circumstances, to reward Plaintiffs for getting to the courthouse first -- especially where public policy strongly encourages parties to put their environmental dollars to cleanup rather than litigation -- would be unfair, inequitable and against the interests of justice.

WHEREFORE, defendant ARCO respectfully requests that an Order be issued transferring this case to the United States District Court for the District of Colorado, pursuant to 28 U.S.C. § 1404(a); and for such other and further relief as the Court may deem appropriate.

Dated: *March 6, 1996*

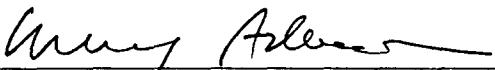
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CASE NO: 5:95CV2115

JUDGE STAGG
MAGISTRATE JUDGE PAYNE

CASE TITLE: CRYSTAL OIL CO V ATLANTIC RICHFIELD CO

NOTICE OF SETTING OF MOTION(S)

The motion to transfer case to Colorado filed by Atlantic Richfield on 3/6/96 will be submitted to the Honorable Roy S. Payne on the April 8, 1996 Motion Day at Shreveport, Louisiana. A written ruling will be issued in due course.

A COPY OF ALL BRIEFS MUST BE DELIVERED TO CHAMBERS WHEN FILED. Opposing briefs are due within 15 calendar days from the date of this notice and reply briefs may be filed, without leave of Court, within 5 business days thereafter. Local Rule 4W governs the length of briefs. Any party filing no brief will be deemed not to oppose the motion.

It is the policy of the Court to decide motions on the basis of the record without oral argument. Accordingly, responses and briefs should fully address all pertinent issues. Should the Court feel oral argument is necessary, all parties will be notified.

If the parties resolve any matters raised in this motion, the moving party should immediately notify Magistrate Judge Payne at 318/676-3265.

Shreveport, Louisiana, on March 7, 1996.

ROBERT H. SHEMWELL, Clerk of Court

By: Celia Gallagher
Deputy Clerk

COPY SENT:

DATE: March 7, 1996
BY: cag
TO: Cassanova and
Carter, Adams, Freeman, Milner